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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/856,445	08/17/2001	Elizabeth Devine	KEL01-P111	8281

7590

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EXAMINER

BHAT, NINA NMN

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/12/2003

6

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/856,445

Applicant(s)

DEVINE ET AL.

Examiner

N. Bhat

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 17 August 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☒ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2. 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

1. An abstract is required.
2. Applicant is requested to claim benefit of 35 U.S.C. 371 of PCT/EP99/09146, filed November 22, 1999 on Page 1, line 1 of the specification.
3. Claims 1-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, applicant is requested to re-draft the claims in clear, positive, meaningful language and specifically limit the claims to a beverage or drink having a top and bottom layer because the specification and the examples relates to providing a beverage which has a thermoreversible gel in a top layer and bottom layer, both layers being solid or gelled at room temperature when the beverage is heated, the gels reverse from a solid to a liquid. Applicant should also avoid the recitation of "whilst" and "with the proviso" when drafting claims.

4. Claims 2-20 are rejected as being dependent upon a rejected base claim.
5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical

Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000.

Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

6. Claims 1 and 9 are rejected under 35 U.S.C. 102(e) as being anticipated by Tiainen et al.

Tiainen et al. teach an alcohol containing gelatinized beverage which is substantially non-free flowing at room temperature but can be reversibly changed into a free flowing stage by heating. The beverage includes a sweetening agent, gelatin and other ingredients.[Note Column 1, lines 55-67 and Column 2, lines 5-15 and Working examples 2 and 3]. The drink has a water content of less than 70% and includes a at least one thermoreversible setting agent, which is in a gel phase at room temperature and thermo reverts to a liquid upon heating above room temperatures. Sodium caseinate is substantially absent. Applicant's recitation of a "top layer" has no patentable weight because applicant has not claimed a bi-layered product or beverage.

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

9. Claims 2-8 and 10-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tiainen et al. in combination with Soedjack et al. and Rule.

Tiainen et al. teach the invention substantially as claimed.

Tiainen et al. teach providing a jellying product which includes providing a beverage or drink which includes a gelling agent which is solid or in a gelled phase at room temperature and will revert into a liquid when heated above room temperature conditions. Tiainen et al. specifically teach using a thermoreversible gel in beverages, which upon heating will revert from a jelly to a liquid or vice versa. The beverage includes alcohols.

However, Tiainen et al. does not teach a bi-layered beverage or food product which includes a top layer of cream and a bottom layer which also includes a gelling agent, both layers when heated providing a liquid which can be consumed.

Soedjak et al. teach ready to eat multi-layered and multicolored gelled products which includes water soluble colorants and complexing agents for the colorants which will prevent the colorant from migrating within the gelled layer.

Rule teaches a cream alcohol containing beverage which includes a fat layer and a alcohol or water layer, the two layers will separate without homogenization as well as using other ingredients such as emulsifier which will permit the cream to stay in suspension with the alcohol or water layer.[Note Column 1, lines 23-55]

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a gelled drink or beverage which includes a thermoreversible gelling agent which is used in a mounts to maintain a layered food product or beverage such that a top layer having gel and a bottom layer having a gel or other ingredients which provide a beverage which is bleared and is liquid upon heating, the gels reverting the layers into a liquid from reading Tiainen et al in view of Soedjak et al. who teaches preparing a multi-layered gelled product. To use the multi-layered gelled product to provide a bi-layered beverage which employs thermoreversible gels would have been obvious and has been fairly suggested by the combined prior art. To use emulsifier especially when preparing or using a cream alcohol-containing beverage in proportions, which provide best results wherein the emulsion, is stabilized by using emulsifiers and homogenization techniques to provide an emulsified beverage would have been obvious from the teachings of Rule. It is maintained that the prior art fairly suggests a food product having a top layer comprising less than 70% water and an amount of at least one thermoreversible setting agent sufficient to maintain the top layer in a gel phase a room temperature while permitting thermo reversion to a liquid at temperatures high than room temperature which includes emulsifiers, stabilizers, flavorings and other ingredients. To specifically use a thermoreversible gel in a layered food products would have been obvious from the combined teachings of the prior art thus rendering the invention as a whole obvious to one having ordinary skill in the art at the time the invention was made.

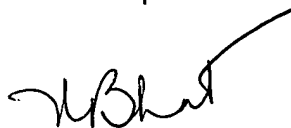
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10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Hashisaka et al. teach a method for reducing color migration in a multilayered , colored , gel based dessert. Ikeda et al. teach a method of making two different material jellied foods. Villagran et al. teach a foamable instant coffee product. Gamez-Rumpf et al. teach a dry mix composition for producing a cappuccino beverage having marbled foam. Jimenez-Laguna et al. [415 and 108] teach a foamed milk based topping for hot beverages. Adachi et al. teach a native acelayted gellan gum in different foods such as soups, puddings, desserts and beverages. Best et al. teach a composite food composition comprising a gell and a process for its preparation.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 703-308-3879. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-306-5665.



N. Bhat  
Primary Examiner  
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